United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1464

To be argued by
EUGENE NEAL KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1464

B P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

CHARLES W. SIMPSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES COURT OF APPEALS
FILED
FEB 3 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1464

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES W. SIMPSON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Charles W. Simpson appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 18, 1977, following an eight day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment S 77 Cr. 532, filed September 23, 1977, in twenty-five counts, charged fourteen defendants with devising and participating in a scheme to defraud various automobile insurance carriers by means of false, fictitious and bogus claims of automobile thefts in violation of Title 18, United States Code, Section 1341. (Counts 1

through 20).* In addition, defendants Simpson, McIver, DeChabert and Karpf were charged with conspiracy to engage in mail fraud and prohibited racketeering activities in violation of Title 18, United States Code, Section 371. (Count 21). These four defendants were also charged with violations of Title 18, United States Code, Section 1962(c), the federal anti-racketeering statute. (Count 22). Defendants Simpson, Creaturo and DeSalvo were further charged with making false statements before a Grand Jury in violation of Title 18, United States Code, Section 1623. (Counts 23 through 25). Thus, Simpson was named as a defendant in nine of the mail fraud counts (Counts 3, 4, 9-12, 14, 17 and 18), as well as in the conspiracy count (Count 21), the racketeering count (Count 22) and one of the perjury counts (Count 23).

Trial commenced on October 3, 1977 against Simpson and four co-defendants. The remaining nine defendants previously had pleaded guilty.** On the second day of

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* In addition to Simpson, named as defendants in two or more of the first twenty mail fraud counts of the Indictment were: Joseph R. McIver; Ricardo DeChabert; John J. Karpf; Charles J. Villani; Harry Mitchell; Ralph Lazzaro; Paul Michel; Joseph A. DeSalvo; Keith R. Watson; Guilio Monaco; Nancy A. Creaturo; Stephen R. Murray; and Stephen Sohanchyk.

** The following summarizes the disposition of this case concerning the nine defendants who pled guilty to charges made against them in either the original or superseding Indictment prior to trial: (1) Ricardo DeChabert—pled guilty September 16, 1977 to count 21 (conspiracy), sentenced November 14, 1977 to 3 years in custody with all but 6 months suspended and followed by 2 years probation; (2) John J. Karpf—pled guilty September 16, 1977 to count 17 (mail fraud), sentenced October 14, 1977 to 2 years in custody with all but 6 months suspended and followed by 2 years probation; (3) Charles Villani—pled guilty September 16, 1977 to count 2 (mail fraud), sentenced October 11, 1977 to 2 years probation and ordered to pay restitution; (4) Harry Mitchell—pled guilty September 23, 1977 to count 4 (mail fraud), sentenced October 21, 1977 to 2 years

[Footnote continued on following page]

trial, defendant Joseph McIver pled guilty to the conspiracy and racketeering charges (Counts 21 and 22),* and the trial proceeded with respect to the remaining four defendants. (Tr. 124-25).** At the close of the Government's proof, the anti-racketeering charge, only as it related to Simpson (Count 22), was dismissed with the consent of the prosecution. (Tr. 657-58). On October 13, 1977, the jury returned verdicts of guilty on the eleven counts remaining against Simpson.***

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probation and ordered to pay restitution; (5) Paul Michel—pled guilty September 16, 1977 to count 8 (mail fraud), sentenced October 14, 1977 to 2 years probation and fined $1,000; (6) Joseph DeSalvo—pled guilty September 28, 1977 to count 10 (mail fraud), sentenced October 21, 1977 to 2 years probation and ordered to pay restitution; (7) Keith R. Watson—pled guilty September 29, 1977 to count 11 (mail fraud), sentenced October 21, 1977 to 2 years probation and ordered to pay restitution; (8) Stephen R. Murray—pled guilty July 28, 1977 to count 17 (mail fraud), sentenced October 14, 1977 to 2 years probation and ordered to pay restitution; and (9) Stephen Sohanchyk—pled guilty September 29, 1977 to count 19 (mail fraud), sentenced October 21, 1977 to 2 years probation. At the time of their respective sentences, the open counts against each of these nine defendants were dismissed.

It is to be noted that, with the exception of Sohanchyk, the other eight of these co-defendants testified on behalf of the Government at trial.

* McIver was sentenced by Judge Weinfeld on November 18, 1977 to 2 years in custody on Count 21, to be followed by 2 years probation on Count 22.

** Abbreviations used in this brief are as follows: "Tr." refers to the trial transcript; "Simp. Snt. Tr." refers to the transcript of Simpson's sentencing; "Br." refers to appellant Simpson's brief; "Simp. Hearing Tr." refers to the transcript of the September 27, 1977 hearing on Simpson's pretrial motions; "GX" refers to Government Exhibits at trial; "DX" refers to defendant Simpson's exhibits at trial.

*** Counts 3, 4, 9-12, 14, 17 and 18 (mail fraud); 21 (conspiracy); and 23 (perjury). Also found guilty by the jury was co-defendant Guilio Monaco (Counts 13 and 14). On November

[Footnote continued on following page]

On November 18, 1977, Judge Weinfeld, after stating his "view that the jury verdict on all counts . . . was fully justified" (Simp. Snt. Tr. 16), sentenced Simpson to concurrent terms of one year in custody on all counts. Simpson is at liberty pending this appeal.

Statement of Facts

The Government's Case

A. Overview of the Conspiracy.

The Government's case, consisting of twenty-three witnesses and over sixty exhibits, overwhelmingly established that Simpson and his co-conspirators participated in a massive scheme to defraud numerous automobile insurance companies and that, during the investigation of

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18, 1977, Judge Weinfeld sentenced Monaco to a term of two years probation, fined him $1000 on each of Counts 13 and 14 (a total fine of $2000) and, in addition, ordered that he pay $3,870.40 restitution to his defrauded insurance carrier, the Hartford. On November 23, 1977, Monaco filed a Notice of Appeal to this Court, but, thereafter, did not prosecute his appeal by the timely filing of an appellate brief. On January 9, 1977, a stipulation was entered into between the Government and Monaco's attorney withdrawing this appeal with prejudice and affirming the judgment of the district court.

The jury was unable to agree on a verdict concerning the remaining two defendants, Lazzaro and Creaturo. Defendant Creaturo subsequently pled guilty on November 3, 1977 to one count of violating 18 U.S.C. § 1014, as charged against her in a separate indictment, 77 Cr. 780, and she was sentenced on November 30, 1977 by Judge Weinfeld to 2 years probation and fined $1000. At the time of her sentence, the open charges against her in both S 77 Cr. 532 and 77 Cr. 780 were dismissed with the Government's consent. With respect to defendant Lazzaro, the Government filed a *nolle prosequi* on November 3, 1977 disposing of all charges pending against him.

these frauds, Simpson testified falsely before the grand jury.*

Defendant Joseph McIver owned and operated an automobile wrecking and junk yard located on East Gunhill Road in the Bronx, New York, known as Newport Auto Wreckers. (Tr. 62-63; 69; 306ff). At this yard, McIver employed Simpson, co-defendant Ricardo DeChabert and other "yard workers", as well as a number of independent or free-lance truck drivers, such as co-defendant John Karpf, who were employed part-time to haul automobiles in various stages of disrepair and destruction to and from the yard. Newport Auto Wreckers' principal function was to derive a profit from the daily dismantling and destruction of numerous perfectly good and serviceable automobiles** in order to enable the owners of these cars to claim falsely that their vehicles had been stolen. After the false claim was mailed to the insurance company, the company paid the insured as if the car actually had been stolen. In this manner, hundreds of thousands of dollars under automobile theft insurance policies were paid by the defrauded companies.***

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* Of course, on appeal the evidence must be viewed in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), with full weight accorded to "the right of the jury to determine issues of credibility, weigh the evidence and draw reasonable inferences of fact." *United States* v. *Greenberg*, 534 F.2d 523, 524 (2d Cir., *per curiam*), *cert. denied*, 429 U.S. 831 (1976). See also *United States* v. *Hawley*, 554 F.2d 50, 52 (2d Cir. 1977).

** The testimony indicated that from 6 to 9 cars a day were dismantled at Newport. (Tr. 529).

*** During the trial, several witnesses testified that only a few of the thousands of cars demolished at Newport Auto Wreckers were stolen vehicles: "McIver never liked doing stolen cars." (Tr. 207-08, 365-66).

Of course, automobile owners desiring to rid themselves of their automobiles were needed to make the fraudulent scheme devised by McIver and carried out at his yard operative. To this end, hundreds of automobile owners, including the ten car owners named as defendants in the Indictment, availed themselves of the services provided by Newport Auto Wreckers, thereby profiting sometimes in excess of $7,000 per automobile from the false theft claims which were submitted.

The scheme employed by McIver and the other participants in these automobile insurance frauds was simple, but, nonetheless, highly effective.* Car owners who desired to collect monies payable under their automobile insurance policies by making false theft claims, were made aware of the fact that McIver and the yard workers at Newport Auto Wreckers, such as Simpson, did so-called "insurance jobs." (Tr. 70). The automobile owners would then take their cars, or have them taken, to the Newport yard, where the car, along with its keys and registration certificate, would be left with McIver, Simpson or another yard employee.

McIver, aided by his yard workers, such as Simpson, would dismantle and cut up these cars in order to make them unrecognizable—removing in the process, any serviceable or saleable parts, which would then be resold at a profit to other junk yards and automobile mechanics. The employees at Newport would next send the scrapped automobile hulk by truck to Pascap, an automobile crusher located in the Bronx, who would compact the chassis of

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* The essentials of the scheme employed by Newport Auto Wreckers to facilitate the defrauding of automobile insurance carriers is set out in some detail in the testimony of "yard worker" (insider) Ricardo DeChabert (Tr. 75ff), as well as in the testimony of various car owner witnesses (defendants) and surveillance agents.

these dismantled cars* and pay McIver and Newport Auto Wreckers for the scrap metal, usually about $30-$40 per car. (Tr. 354ff). From the sale of both the useable parts and the scrap metal derived from these "insurance job" cars, McIver and his employees realized several hundred dollars per automobile—their profit for engaging in these funds.**

Once an automobile had been dismantled, McIver, Simpson or another Newport employee personally would notify the car's owner that the vehicle could be reported stolen to the police and to the respective insurance carrier. This was accomplished by returning a set of keys and the registration certificate for now-dismantled car to the owner.*** The car owners would give a false account concerning the theft of their automobiles to the local police, and, then, to their insurance carriers, who, relying on these false claims, would pay the insurance—or book—value for the supposedly stolen automobile.

Between 1975 and 1977, McIver and his employees participated in from 600 to 1,000 of these so-called "insurance jobs" at Newport Auto Wreckers. (Tr. 76; 151). The loss suffered by the various automobile insurance carriers is conservatively estimated to be in excess of

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* Pascap would not do this unless a registration certificate was produced along with the automobile hulk. For this reason, car owners were required to leave their registration certificate with their vehicle when it was taken to McIver's yard. (Tr. 354).

** McIver of course, received these monies directly, while Simpson and the other yard workers profited indirectly in the form of salary and pay-offs for producing "insurance jobs" at the yard.

*** These items were returned so that the insurance company would not suspect the owner of negligence in the "theft" of his automobile. For example, DeChabert described one particular instance where Simpson secured a registration certificate from McIver in order to return it to the car owner. (Tr. 149-50).

$2 million. McIver and his employees made a profit of several hundred dollars per car.

B. Simpson's Role in the Conspiracy.

We detail in this section of the "Statement of Facts" the facts relating to the substantive counts (as well as the conspiracy) of which Simpson was convicted. The Indictment was concerned with the events and circumstances surrounding the fraudulent disposition of ten automobiles, and Simpson was involved directly in the destruction of five of the cars, which were the subject of counts in the Indictment.* The proof further demonstrated that Simpson worked at the yard when hundreds of other cars were destroyed, and as Judge Weinfeld noted at the time of Simpson's sentence:

> "it is inconceivable that you [Simpson] did not know what was going on . . . . No man could have been in that yard where the prime function was demolishing these cars without knowing what was going on . . . . I think you would have had to have been a blind man not to know what was going on in that yard. It wasn't one or two instances, it was a daily occurrence." (Simp. Snt. Tr. 14-15).

1) Mitchell's 1971 Oldsmobile (Counts 3, 4 and 21)

In September, 1975, Simpson, with the assistance of other Newport workers, dismantled Harry Mitchell's 1971 Oldsmobile. (Tr. 89; 623-25). Prior to Simpson's destruction of this car, Mitchell had arranged through his mechanic, Joseph McClary, to have McIver dispose of his

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* We thus omit from this discussion the facts surrounding the fraudulent disposition of the automobiles belonging to co-defendants Villani, Lazzaro, Michel, Creaturo and Sohanchyk.

car so that he could then collect on his theft insurance policy. (Tr. 249).

After Simpson and the other yard employees dismantled the car, Mitchell's mother, Thelma King, returned to the Newport yard and secured the keys and registration certificate for Mitchell's Oldsmobile. (Tr. 89; 259). She returned these items to her son who falsely reported the theft of his car to both the New York City Police Department and his insurance company, GEICO.* (Tr. 259ff; 260; GX 3A, 4). After corresponding with GEICO by mail, Mitchell received a check for over $2300 for his supposedly stolen automobile. (Tr. 225; 251; GX 3A).

2) DeSalvo's 1969 Fiat (Counts 9, 10, and 21)

Simpson was responsible for physically dismantling Joseph DeSalvo's 1969 Fiat in order to permit DeSalvo to submit a false claim to his insurance company. DeSalvo's Fiat was in need of several hundred dollars in repairs that he could not afford. (Tr. 320-24). He told his brother-in-law Peter Baisi that he wanted to get rid of the car and collect on his insurance policy. (Tr. 322-24; 329-30). Baisi, in turn, approached McIver who informed Baisi that getting rid of DeSalvo's car, thereby allowing DeSalvo to make a false theft claim and to collect the insurance proceeds, presented no problem. (Tr. 330-31).

Arrangements were made for DeSalvo to leave his car at a certain location in the Bronx, where it would be picked up and taken to the Newport yard. (Tr. 324; 331-33). On September 23, 1975, Special Agent Hutton of the FBI observed this 1969 Fiat transported into the Newport yard on the back of a flatbed truck. (Tr. 516-17; GX 64).

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*GEICO is an acronym for the Government Employees Insurance Company.

On September 29 and 30, 1975, Agent Hutton again observed this car, this time being dismantled by Simpson and a number of other yard workers at Newport. (Tr. 91-517-20; GX 66 and 67).* Simpson was seen cutting th car up, following which the sportscar's hulk was loaded onto John Karpf's truck and transported to Pascap. (Tr. 518-20).

Shortly thereafter, McIver informed Baisi that the Fiat could be reported stolen, and Baisi passed this information on to DeSalvo. (Tr. 324; 333). DeSalvo then falsely reported the theft of this car to both the New Rochelle Police Department and his insurance broker on October 15, 1975. (Tr. 324-26; GX 9 and 10). After the mails were used to process DeSalvo's claim, State Farm Mutual Insurance Company paid $1280 under its theft insurance policy with DeSalvo. (Tr. 316-18; GX 9).

3) Watson's 1975 Buick (Counts 11, 12 and 21)

Simpson not only helped to dismantle Keith Watson's 1975 Buick, but, perhaps more significantly, it was this defendant that negotiated directly with Watson and arranged the destruction of this practically brand-new automobile. In September 1975, while Watson was at McIver's yard he asked another individual if he desired to purchase this Buick, which, although only several months old, Watson had determined to sell or otherwise dispose of. (Tr. 93; 272). This other individual declined, but asked Watson if he had full insurance coverage for the Buick, and, when Watson replied that he did, informed Watson that a friend of his—Simpson—could get rid of the Buick and thereby allow Watson to collect the insurance proceeds. (Tr. 272-73).

A few moments later, Simpson was called out of the yard and met with Watson. (Tr. 273). Watson informed

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* DeChabert testified that this Fiat "stayed in the yard for a lengthy time" before "McIver decided that it [was] time to dismantle it." (Tr. 90).

Simpson that he wanted to get rid of the Buick and Simpson replied that he could take care of it. (Tr. 273). Watson told Simpson that he would think this proposition over and advise Simpson if he wanted to participate in such an insurance fraud. (Tr. 273).

A week later Watson returned to the Newport yard and met with Simpson. (Tr. 274). Watson asked Simpson if the Buick could be gotten rid of that day, to which Simpson replied that it was too late in the day, but if Watson left the car, he, Simpson, would demolish it on Monday. (Tr. 274). Watson agreed to this procedure and informed Simpson that he desired to have the wheels and the tape deck from his car removed prior to its destruction. (Tr. 275). Simpson drove the car into the Newport yard and proceeded to remove its wheels, as well as the tape deck from under the dash. (Tr. 91; 275).

While removing the wheels and tape deck, Simpson informed McIver of the deal he had made with Watson. (Tr. 275-76).* McIver proceeded to assure Watson that they would take care of his car on Monday and that, once demolished, the car's hulk would be placed on the street so that Watson could recover it in a dismantled condition. (Tr. 276). After the wheels and tape deck had been removed from the car and these final arrangements had been made, Simpson drove Watson to a friend's house on Fisher Avenue in the Bronx, where he delivered Watson together with the Buick's wheels and removed tape deck. (Tr. 275).

On September 29, 1975, starting at about 9:15 in the morning, Special Agent Hutton of the FBI commenced

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* Watson was positive in his in-court identifications of Simpson and McIver, telling defense counsel on cross-examination that he recognized them because they were the two people that he dealt with at Newport, "that I knew at the time." (Tr. 311-12; 313).

observations of Watson's car in the Newport yard. (Tr. 520; GX 66). Just as Simpson had promised, Agent Hutton observed Watson's car being dismantled throughout the day by Simpson, DeChabert, and other Newport employees. (Tr. 93-95; 520-22; GX 66). That evening Watson returned to the Newport yard where he again met with Simpson. (Tr. 277). Simpson advised that the Buick had been demolished and had been placed on the street as they had previously arranged. (Tr. 96; 277). Watson left the yard and immediately falsely reported his car stolen both to the New York City Police and his insurance company, GEICO. (Tr. 277-78; GX 11A and 12).

On Tuesday, September 30, Agent Hutton discovered the burned out hulk of Watson's car located on the service road to Interstate 95, the New England Thruway, and removed its vehicle identification plate. (Tr. 96; 523; GX 34). On Thursday, Watson similarly discovered his car on Interstate 95 and so informed his insurance company. (Tr. 278). He then arranged for the car to be picked up by Mario's Towing Service and taken to an adjuster's shop. (Tr. 96; 278-79). GEICO ultimately paid Watson over $7,000 in theft insurance for a car that never was stolen. (Tr. 275; 279ff; GX 11A).*

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* The proof also showed that shortly after he had demolished Watson's car, Simpson made a number of statements to his colleagues in the yard concerning his role in arranging for the disposition of this vehicle. (Tr. 96ff; 203). Simpson complained to DeChabert that he had arranged this insurance job, that Watson's car had been demolished, and that McIver, rather than himself, had derived the profit from it. (Tr. 97; 106-08). As DeChabert put it in his testimony, "Charley was [mad] because he . . . had brang some insurance job[s] in and he had not received . . . no money . . . Joey was making all the money and he wasn't." (Tr. 203). Simpson, who could recall little else during his testimony, remembered perfectly that this conversation did not occur and that the argument he had had with McIver was about a traffic ticket. (Tr. 771-72).

4) Monaco's 1972 Cadillac (Counts 13, 14 and 21)

Simpson, along with co-defendant DeChabert and other Newport employees, dismantled Guilio Monaco's 1972 Cadillac, on September 29, 1975.* (Tr. 98; 176; 524ff; 526; GX 66). After they destroyed Monaco's car, Monaco claimed to the police and his insurance carrier, the Hartford, that his car had been stolen on the night of October 3, while he was eating dinner in Little Italy. (GX 13 and 14). Monaco fraudulently received over $4100 for both his supposedly stolen car and the rental car supposedly necessitated by the theft. (Tr. 374ff; GX 13).**

5) Murray's 1972 Eldorado Cadillac (Counts 17, 18 and 21)

Steven Murray's 1972 Cadillac Eldorado had been stolen in September, 1975. When the car was recovered, Murray was dissatisfied with the settlement made by his insurance carrier, GEICO. (Tr. 340ff; GX 17B). Murray complained to Simpson's co-defendant, John Karpf, and Karpf advised Murray that his car could be gotten rid of and that Murray could then collect the theft insurance. (Tr. 345-46; 356-57).

Murray agreed to Karpf's proposal and gave the car to Karpf, who drove it to McIver's yard, where he announced that the car was to be junked. (Tr. 346-47; 367-58).*** Shortly after its arrival in the yard, Agent

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* While conducting surveillance of McIver's yard, FBI agent Hutton observed Simpson cut the seats of Monaco's car and then smear mud onto them. (Tr. 98; 526).

** As noted *supra*, Monaco has withdrawn his appeal of the conviction for his role in this fraud.

*** Karpf stated that he brought Murray's car to Newport because from "working in the the yard I found out that they were doing insurance jobs." (Tr. 358).

McDonald of the FBI observed Murray's car being destroyed by Simpson,* McIver, and other workers in the Newport yard. (Tr. 637ff; GX 81).

The next day, Karpf returned to the Newport yard where he secured the return of the keys and registration certificate for Murray's automobile. (Tr. 359). He delivered these items to Murray, along with a hood ornament that he had earlier removed from the car, and, in return, Murray paid Karpf a sum of money. (Tr. 112; 347-48; 359). That night, November 20th, Murray falsely reported the theft of his car to the local precinct of the New York City Police Department and, the following morning, he reported this supposed theft to GEICO. (Tr. 348-49; GX 17A and 18). Several weeks later, Murray received a $4500 check in settlement of his claim. (Tr. 349ff; GX 17A).

C. Simpson's Perjury (Count 23)

On June 15, 1977, Simpson repeatedly testified falsely before the grand jury investigating these insurance frauds. When questioned about his role in and knowledge of the fraudulent activities conducted at Newport Auto Wreckers during his employment in that yard, Simpson deliberately attempted to mislead the grand jury and conceal his relationship with the crimes committed at Newport.**

Simpson's false testimony before the Grand Jury was in two general areas: his role with respect to a number

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* Agent McDonald's observations included seeing Simpson remove the front end of this car with a torch. (Tr. 638-39).

** While "proof of any of the specifications [was] sufficient to support a verdict of guilty", *United States* v. *Bonacorsa*, 528 F.2d 1218, 1222 (2d Cir.), *cert. denied*, 426 U.S. 935 (1976), the proof at trial overwhelmingly demonstrated the perjurious nature of every specification, and its sufficiency is not challenged here.

of particular vehicles demolished in the Newport yard and his more general functioning as a Newport employee. The first series of specifications included questions concerning Simpson's role in the demolition of several automobiles, including Watson's Buick, Monaco's Cadillac, Murray's El Dorado Cadillac convertible and DeSalvo's Fiat sports-car. (Tr. 451ff; GX 23). Simpson flatly denied assisting in any manner in the dismantling of these automobiles. (*Id.*)* The proof demonstrated, however, that Simpson was involved in the destruction of each of these cars. Indeed, the proof showed that Simpson not only helped to destroy Watson's Buick, but had arranged this entire "insurance job." See *supra* at pp. 10-12.**

The second group of specifications related to whether Simpson had dismantled any cars or any Cadillacs which

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* At trial much ado was made concerning whether or not Simpson understood the thrust and import of these and other questions asked of him during his June 15 Grand Jury appearance. (*E.g.*, Tr. 774ff; 982). While Simpson's testimony itself provided answers to this claim, *e.g.*, exculpatory claims interposed beyond the scope of the answers called for (Tr. 885), clearly the issue was one for the jury to determine, as Judge Weinfeld so held. (Tr. 872). *United States* v. *Alberti*, Dkt. No. 76-1543, slip op. 5505, 5517 (2d Cir., Aug. 24, 1977); *United States* v. *Corr*, 543 F.2d 1042, 1049 (2d Cir. 1976); *United States* v. *Long*, 534 F.2d 1097, 1100-01 (3d Cir. 1976). As the trial judge later observed, "I observed this man on the witness stand. He was able to answer questions. He certainly understood all the questions. You [Mr. Stone] are making it appear that he was just utterly at sea and he didn't know what was going on. The record doesn't bear that out one bit. . . ." (Simp. Snt. Tr. at 7).

** Another series of specifications along this same line related to a black over yellow Toyota automobile which Simpson, quite specific in his memory, denied having anything to do with during his testimony before the Grand Jury. (Tr. 468; GX 23). At trial, Agent MacDonald of the FBI testified to the falsity of these answers, indicating that he had observed Simpson both drive this Toyota into the Newport yard on November 18, 1975 and, thereafter, participate in its demolition. (Tr. 635-36).

were in good running order while employed at Newport. (*Id.*). In response to these questions, Simpson testified that he "never" dismantled vehicles in good running order, but instead had only demolished "wrecked automobiles" at Newport. (Tr. 468-69). Not only is the falsity of this testimony shown by reference to the specific automobiles discussed *supra*,* and the testimony of his co-worker DeChabert (Tr. 103-04; 127-29),** but by Simpson's own implausible trial testimony as well. (See *infra* and Tr. 887-88).

The Defendant's Case

Simpson testified on his own behalf, although presenting no other evidence.***

Simpson's testimony resolved itself to the proposition that he was merely an employee of McIver's following the orders of McIver and others, completely unaware of the illegal activities conducted at the Newport yard. (Tr. 737-86; 805-15). To this end, Simpson testified about

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* Watson's Buick was almost brand new and functioned properly as Watson so testified. Similarly, Murray, DeSalvo and Monaco, as well as Mitchell and Mrs. King, all testified that their cars were functioning, *supra*—indeed, Monaco testified that his car was in perfect order (Tr. 857-58)—and the proof showed that Simpson himself had driven the Toyota to the yard.

** DeChabert, in addition to testifying that he and Simpson had specifically discussed "insurance jobs" (Tr. 103)—a fact which Simpson denied knowledge of both in the Grand Jury and at trial—also stated that when Simpson's own car was inoperative he used cars left in the yard for transportation. (*Id.*). This, of course, further demonstrates Simpson's knowledge that the vehicles he later demolished were in running condition.

*** In addition, evidence was presented by the other three defendants on trial. (Tr. 693-737; 816-25; 832-65). As these defendants—Monaco, Creaturo and Lazzaro—are not involved in this appeal, such testimony is not discussed here.

his humble origins and background (Tr. 738-43); how he came to work at Newport in 1975 for $150 a week driving a truck and "cutting up cars" (Tr. 743-44); his previous conviction for "car stripping" (Tr. 746-47); as well as his arrest and the interview of him by government investigators in January 1976. (Tr. 746ff; discussed *infra*).* Simpson denied knowing what an "insurance job" was, saying that his only contact with insurance at Newport was when McIver bought some cars from "country-wide insurance" which, on orders, he then "cut up". (Tr. 756). He also testified that it was not part of his job to determine if a car was in good running condition, but instead simply followed orders to cut up cars when told to do so. (Tr. 756; 766ff).**

Simpson denied having any involvement with the disposition of Watson's automobile, despite the strong proof to the contrary offered by co-defendants Watson and DeChabert and FBI agent Hutton on the Government's direct case. (Tr. 769-72; 808-13). In addition, he continued

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* Throughout this, and his later testimony, Simpson repeatedly used the phrase, "I don't recall." (*E.g.*, Tr. 749-55). Later, or direct examination, true to his perjurious nature, Simpson denied knowing what "recall" meant, when that word was used in connection with his questioning before the Grand Jury. (Tr. 774). Simpson then proceeded to use that phrase repeatedly during the remainder of his testimony. (*E.g.*, Tr. 775).

Similarly, Simpson attempted to innocuously explain Agent Hutton's observations of him cutting the seats of Monaco's car and then smearing mud on them. (Tr. 760-61). As was pointed out on summation, these explanations were simply implausible. (Tr. 882-83).

** This testimony alone demonstrated the falsity of his grand jury testimony that he *never* dismantled cars in good running order—at best a truthful answer could only have been that he did not know whether the cars he dismantled were operable or not. (Tr. 886-88). Similarly when, later in his testimony, Simpson said he never cut up operable cars, its falsity was patent. (Tr. 776).

along the path struck during his Grand Jury testimony denying his involvement with other operable vehicles. (Tr. 776; 810ff).

In sum, Simpson's trial testimony was a denial of every material allegation against him which the jury found to be false and rejected by its verdict and which Judge Weinfeld later characterized as "inconceivable": "I think you would have had to have been a blind man not to know what was going on in that yard." (Simp. Snt. Tr. 15; see also *id.* at 14).*

ARGUMENT

Simpson Was Not Deprived Of His Constitutional Rights During His Grand Jury Testimony.

Simpson contends that his conviction should be reversed, and the indictment dismissed, because he was not adequately represented when he testified before the grand jury and because he was treated unfairly by the Government at the time of his grand jury appearance. (Br. 5-8). Both claims are without merit.** To understand fully Simpson's claims, a brief factual statement is necessary.

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* As was the trial jury, this Court is, of course, entitled to draw such adverse inferences as fairly arise from the outright rejection of Simpson's patently false trial testimony. *United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir.) *cert. denied*, 419 U.S. 1079 (1974); *United States* v. *Chestnut*, 399 F. Supp. 1292, 1294 n.3 (and the cases there cited) (S.D.N.Y. 1975; Weinfeld, D.J.), *aff'd*, 533 F.2d 40 (2d Cir. 1976).

** Except for the claim of unfairness by the prosecutor, it is doubtful that Simpson properly preserved the other legal issues he now raises in this appeal. Despite the fact that this defendant made extensive motions before the District Court attacking the grand jury proceedings, and specifically attacking grand jury counsel for not advising him properly of his rights, Simpson never claimed before the District Court that the indictment should

[Footnote continued on following page]

A. Factual Background.

Simpson was arrested on January 20, 1976 on the basis of a complaint charging Simpson, McIver, DeChabert, Karpf and other individuals with conspiracy to commit interstate transportation of stolen property. (Assistant United States Attorney Kaplan Pretrial Affidavit p. 8 and Exhibit C thereof). The complaint, which arose from the FBI surveillance of the Newport yard during the fall of 1975, charged the individuals named with conspiring to receive *stolen* automobiles at Newport Auto Wreckers, to dismantle these cars and to cause the cars' parts to be transported in interstate commerce. (*Id.*).*

At the time of his arrest on these earlier charges, Simpson was interviewed by both the FBI and an Assistant United States Attorney. (GX 3529A and DX C). In the pre-arraignment interview of January 20, 1976,

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be dismissed or the grand jury testimony suppressed because of the ineffective assistance of counsel at that stage. A party cannot shift his position on appeal and advance an argument not pressed below. *United States* v. *Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 97 S.Ct. 2686 (1977). See also *United States* v. *Fuentes*, 563 F.2d 527, 531 (2d Cir. 1977); *United States* v. *DiNapoli*, 557 F.2d 962, 965 n.3 (2d Cir. 1977); *United States* v. *Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Accordingly, Simpson has waived the issue he advances for the first time on appeal.

* It is to be noted that the vehicles alleged to have been stolen in this complaint did not later become a part of the insurance fraud charges of present indictment. (Kaplan Pretrial Affidavit pp. 8-9). Indeed, the only factual relationships that the complaint had to the Indictment's charges aganist Simpson were: (1) as showing a basis for the interstate element of the racketeering charge (Count 22) which was withdrawn by the Government against Simpson; and (2) mention of the Toyota automobile which later formed one of the many perjury specifications against Simpson.

Simpson stated that he could not recall driving a 1974 Toyota into the Newport yard on November 18, 1975, but might have, and that he was unaware of stolen cars being taken apart and sold at Newport. (DX C).*

In the FBI interview of him on the same day, "Simpson denied having any knowledge that vehicles he worked on at Newport were either stolen or would be reported stolen after they [had] been dismantled and cut up for parts." (GX 3529A).** In addition, Simpson told the FBI agents that he was not able to remember whether he drove the 1974 Toyota in question into the Newport yard on November 18th or whether he subsequently saw it on November 19th.*** As in the instance of his inter-

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* Apart from this 1974 Toyota, Simpson was not questioned about, and did not discuss, any other specific automobiles during the interview by the Assistant United States Attorney. (DX C).

** The proof at trial, for example, concerning Watson's car, *supra* pp. 10-12, showed this statement by Simpson to be patently false and wholly consistent with the perjurious testimony that he gave in the grand jury, rather than of any benefit to Simpson as he now appears to contend.

*** GX 3529A was not introduced into evidence at trial and, therefore, for the assistance of this court the relevant portions of this FBI report of the interview with Simpson on January 20, 1976 are set out below:

> "SIMPSON advised he has been employed at Newport Auto Wreckers since approximately November, 1975, as a mechanic and prior to that time he was employed at the J&D Service Station directly across Gunhill Road from Newport Auto Wreckers. SIMPSON denied having any knowledge that vehicles he worked on at Newport were either stolen or would be reported stolen after they have been dismantled and cut up for parts. He stated he was not able to remember whether or not he drove a 1974 Toyota, two door, yellow, New York License 881-WGX, Vehicle Identification Number (VIN) RN 21 128942, into the yard of Newport Auto Wreckers at approximately 4:00 p.m. on November 18, 1975; nor was he able to remember seeing this vehicle at Newport on November 19, 1975. . . .
>
> SIMPSON denied knowledge of any type of illegal activity taking place at Newport Auto Wreckers."

view by the Assistant United States Attorney, Simpson was not asked any questions concerning other automobiles which in any way touch upon the present charges against him.*

Following Simpson's arrest on January 20, 1976, subsequent investigation conducted by the FBI and the United States Attorney's Office revealed that, contrary to the initial belief of those concerned, the myriad of cars observed by the FBI during its surveillance of Newport were not stolen vehicles, but rather were automobiles taken to the yard as part of schemes to defraud automobile insurance carriers. (Kaplan Pretrial Affidavit at 9). As this further investigation began to bear fruit, the complaint charging Simpson and others with dealing in stolen property was dismissed on June 1, 1976 at the request of the Government. (*Id.* and Exhibit D thereof).

A Grand Jury investigation was thereafter commenced to inquire into the possible insurance frauds committed at the Newport yard. (*Id.*). After hearing from numerous witnesses over the course of several months, on July 20, 1977, the Grand Jury returned the original indictment in this case, premised not on stolen automobiles, as was the complaint, but rather on a series of insurance frauds committed by both Newport employees and automobile owners.

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* In his brief, Simpson repeatedly refers to his having been asked about more than one car—the Toyota—during these interviews and his inability to recollect "these" cars. (Br. 2-3). This simply was not the case. The only now relevant car about which Simpson was questioned on January 20, 1976 was the 1974 Toyota. He was not questioned concerning the cars belonging to Watson, Mitchell, Monaco, Murray or DeSalvo, all of which the proof at trial showed him to have been involved with and to have perjured himself with respect to during his Grand Jury testimony.

Simpson was subpoenaed to testify during the course of this investigation. When he first appeared before the Grand Jury on June 13, 1977, Simpson, who was then not represented by counsel, invoked his Fifth Amendment privilege not only in response to questions, but with respect to the advice of his rights as well. (Kaplan Pretrial Affidavit at 2-3).* After briefly consulting with the prosecutor during a recess, Simpson was recalled to the Grand Jury and instructed to proceed to the office of the United States Magistrate where counsel would be assigned to him under the Criminal Justice Act. (Kaplan Pretrial Affidavit at 3-4). His Grand Jury appearance was thereupon adjourned to June 15th. (*Id.*.)

On June 15, 1977, Simpson again appeared before the Grand Jury, this time represented by Alan Salzman, Esq. (Kaplan Pretrial Affidavit at 4). In advance of testifying, Simpson was again advised of his rights, this time responding that he understood these constitutional safeguards. (Tr. 451-55; GX 23).** Simpson then proceeded to testify, albeit falsely, at no time indicating that his recollection needed to be refreshed or that he desired to consult with counsel and this resulted in his instant charge and conviction for perjury. (Tr. 451-75; GX 23).***

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* The minutes of Simpson's first Grand Jury appearance are annexed to the Kaplan Pretrial Affidavit as Exhibit A.

** At trial Simpson acknowledged that he was "read his rights" at this time, telling Judge Weinfeld that he was told that "Anything that I said could be used against me." (Tr. 755).

*** During the course of his Grand Jury testimony a recess was declared, at which time Simpson consulted with his attorney outside of the Grand Jury room. Upon his return, Simpson was told that he had a statutory right to recant any perjurious testimony. (Tr. 471-72). Simpson declined to recant (*id.*) and continued in his false testimony. (Tr. 472ff).

B. The Quality of Simpson's Representation By Counsel During a Grand Jury Investigation Has No Bearing on Simpson's Subsequent Convictions For Mail Fraud, Conspiracy and Perjury.

Before we address Simpson's argument that he was not adequately advised by the attorney representing him at the time of his grand jury testimony, we believe it appropriate to discuss a preliminary, but rather significant point—a witness cannot defend a perjury charge on the ground that he did not receive adequate representation of counsel when he appeared before the grand jury and testified falsely. This conclusion stems from two well-settled propositions: 1) A witness cannot avoid a perjury conviction because at the time he gave the false testimony his rights allegedly had been violated; and 2) a witness does not have a Sixth Amendment right to counsel before the grand jury.

Simpson's claim is simply that once having been assisted ineffectively by counsel during the grand jury proceeding he can testify falsely before that grand jury with absolute impunity, and any indictment growing out of the grand jury's investigation, including charges of perjury, conspiracy, and mail fraud, must be dismissed. The law of course does not tolerate such a result. Regardless of the quality of representation a witness receives, that witness is simply not entitled to lie.

Indeed, the thrust of Simpson's claim has been rejected by the recent decision of the Supreme Court in *United States* v. *Wong*, 97 S. Ct. 1823 (1977). In *Wong*, a defendant indicted for perjury attempted to secure the suppression of the false grand jury testimony on the ground that no effective warning of her Fifth Amendment privilege to remain silent was given. A unanimous Court rejected the argument that failure to give an effective self-incrimination warning precluded a perjury prosecu-

tion. A witness who should have been given a Fifth Amendment warning is simply not entitled to testify falsely before the grand jury when the warning is not given. Similarly, even if Simpson's attorney should have done what Simpson's current attorney claims an effective attorney would have done, Simpson's blatant perjury is legally not justified. In view of the well-settled rule that a conviction for perjury, even when arising from testimony given under unconstitutional circumstances, is proper, Simpson's ineffective assistance of counsel claim is simply not pertinent in deciding whether his perjury, mail fraud, and conspiracy convictions were proper.*

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* The cases supporting the proposition that a defendant cannot avoid a perjury conviction because he had a justifiable basis not to answer the question or that the Government violated his rights during the proceeding in question are legion. In addition to the cases cited and discussed in *United States* v. *Wong, supra,* see *e.g., United States* v. *Mandujano,* 425 U.S. 564, 576-77 (1976):

> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it.
>
> . . . [O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjuror complained that the Government exceeded its constitutional powers in making the inquiry."

See also *id.* at 584-85 (Brennan, J., concurring); 609 (Stewart, J., concurring); *Bryson* v. *United States,* 396 U.S. 64, 72 (1969) ("Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them."); *Harris* v. *New York,* 401 U.S. 222, 225 (1971); *Walder* v. *United States,* 347 U.S. 62 (1954); *United States ex rel. Annunziato* v. *Deegan,* 440 F.2d 304, 306 (2d Cir. 1971). *Accord, eg., United States* v. *Winter,* 348 F.2d 204, 208-10 (2d Cir.), *cert. denied,* 382 U.S. 955 (1965).

Moreover, even if Simpson could demonstrate that his attorney at the time of his grand jury appearance rendered ineffective assistance—a claim we shall show is specious—Simpson's claim that the indictment be dismissed or the testimony suppressed must fail for an additional reason. Simpson simply had no Sixth Amendment right to counsel before the grand jury, and thus had no corollary right to the effective assistance of counsel. The Supreme Court in *United States* v. *Mandujano*, *supra*, 425 U.S. at 581, made clear that there is no Sixth Amendment right to counsel before the Grand Jury:

> "No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play. *Kirby* v. *Illinois*, 406 U.S. 682 (1972). A witness 'before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel. . . .' *In re Groban*, 352 U.S. 330, 333 (1957)."*

The result in *Mandujano* was mandated because the Sixth Amendment right to counsel does not emerge until "at or after the initiation of *adversary* judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraign-

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* The right to counsel enjoyed by Simpson before the Grand Jury, if such is considered to be a constitutional right, arises under *Miranda*. This was made clear by the Court in *United States* v. *Mandujano*, *supra*, 425 U.S. at 581 n.6: "The Sixth Amendment was not implicated." As to such a *Miranda* right, its requirement at the Grand Jury stage is, at best, unclear since this right is premised on "a setting thought inherently coercive", *id.*, and as this Court has noted, "[a]ppearing before a grand jury is not inherently coercive." *United States* v. *Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

ment," *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972),* and it is settled law that "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). See also *United States* v. *Levinson*, 405 F.2d 971, 980 (6th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

Progressing forward from this settled proposition, it follows that the concomitant Sixth Amendment right to the effective assistance of counsel** had not come into play when Simpson testified before the grand jury. Thus, when counsel represents a defendant prior to the com-

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* As the Court observed in *Kirby* v. *Illinois, supra*, 406 U.S. at 689-90:

> "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the (criminal prosecutions) to which alone the explicit guarantees of the Sixth Amendment are applicable."

See also, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Royd* v. *Henderson*, 555 F.2d 56, 61 (2d Cir.), *cert. denied*, 98 S. Ct. 410 (1977); *United States* v. *Masullo*, 489 F.2d 217, 222 (2d Cir. 1973); *Perrone* v. *United States*, 416 F.2d 464, 465 (2d Cir. 1969); *United States* v. *Capaldo* 402 F.2d 821, 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969); *United States* v. *Paige*, 421 F. Supp. 1024, 1026 (S.D.N.Y. 1976); *United States* v. *Kane*, 243 F. Supp. 746, 753-54 (S.D.N.Y. 1965; Weinfeld, DJ.).

** "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970). See also *LiPuma* v. *Commissioner*, 560 F.2d 84, 93 (2d Cir.), *cert. denied*, 98 S. Ct. 189 (1977).

mencement of adversary criminal proceedings, at a time when no Sixth Amendment right to counsel exists, and such counsel is alleged to have acted incompetently, this alleged conduct is of no consequence because "[a]s long as defendant is competently represented by counsel at those stages which are considered 'critical' . . . then no constitutional violations have occurred." *Brown* v. *United States*, 551 F.2d 619, 620-21 (5th Cir. 1977).*

C. Simpson Was Adequately Represented.

Simpson's attorney's representation before the grand jury can hardly be construed as ineffective assistance of counsel. As Simpson concedes, this Court has consistently adhered to a stringent standard in determining the alleged ineffective assistance of counsel. Most recently this court reiterated the relevant standard:

> "[U]nless the purported representation by counsel was such as to make the trial a farce and mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . ."

United States v. *Bubar*, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977), quoting *Rickenbacker* v. *Warden*, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 98 S. Ct. 103 (1977), and *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) (and see the other cases noted in *Bubar*, slip op. at 4536).

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* There is no allegation that Simpson's successor attorney, Mr. Stone, was inadequate, nor would the trial record support such a claim.

Judged by this rigorous test, Simpson's claim cannot prevail.*

None of Simpson's claimed defects on the part of counsel constitute ineffective assistance of counsel. First, Simpson states in his brief that Mr. "Salzman had only been his attorney for a maximum of 48 hours and . . . had only talked to him for a short time." (Br. 3). Apart from the fact that Mr. Salzman, in his affidavit, indicates that he "had an opportunity to speak with [his] client", consulted with Simpson concerning various matters prior to his Grand Jury testimony, including advising the defendant of his rights (Salzman Affidavit at 1-2), it is settled law that the brevity of consultation does not establish ineffective assistance of counsel. *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 458 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Tribote*, 297 F.2d 598, 601 (2d Cir. 1961). As this Court said in its seminal decision of *United States* v. *Wight*, *supra*, 176 F.2d at 79 ". . . time consumed in oral discussion . . . is not the crucial test of the effectiveness of the assistance of counsel." **

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* In considering the effectiveness of his counsel, the claims advanced by Simpson must be viewed in the context of the strength of the Government's case against him. *United States* v. *Bubar*, *supra*, slip op. at 4537 n. 15 (and the cases there collected). See also *LiPuma* v. *Commissioner*, *supra*, 560 F.2d at 91; *United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975); *United States* v. *Katz*, 425 F.2d 928, 930 (2d Cir. 1970). Here, as the Statement of Facts, *supra*, demonstrates the case against Simpson was overwhelming.

** For example, see *United States* v. *Sonnenschein*, Dkt. No. 77-1268, slip op. 199, 200 (2d Cir. Nov. 2, 1977) (substitution of one lawyer for another on the second day of trial held not to constitute ineffective assistance); *United States* v. *Waters*, 461 F.2d 248, 250 (10th Cir.), *cert. denied*, 409 U.S. 880 (1972) (counsel appointed on day of jury selection and trial commenced

[Footnote continued on following page]

In addition to the claimed brevity of his consultations, Mr. Salzman is faulted for not having secured the defendant's prior statements from the Government in advance of the June 15th testimony. (Br. 3, 6). Since Simpson was not legally entitled to such statements, his attorney's representation cannot be characterized as ineffective for having failed to secure them. *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975); *United States* v. *Del Toro*, 513 F.2d 656, 664 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *United States* v. *Winter*, *supra*, 348 F.2d at 120.* As one court recently noted in denying a claim almost identical to that advanced by Simpson here:

> "Movants also cite *Bursey* v. *United States*, *supra*, for the proposition that they have a right to inspect the FBI interview records prior to testifying before the grand jury, lest they be subject

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next day; held effective); *United States* v. *Trigg*, 392 F.2d 860, 862-63 (7th Cir.), *cert. denied*, 391 U.S. 961 (1968) (counsel appointed one day and trial commenced the next; counsel held effective). In addition, see generally, *United States ex rel Marcelin* v. *Mancusi*, 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973); *United States* v. *Bentvena*, 319 F.2d 916, 935 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); *cf. United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). As Judge Weinfeld noted in a different, but related context: "a lawyer was assigned to represent him [Simpson] he conferred with a lawyer, and you say for a few minutes and I don't know if time is a relevant factor . . . ." (Simp. Snt. Tr. at 5).

* For example, in *United States* v. *Del Toro*, *supra*, the defendant contended "that the prosecutor should never have taken him before the Grand Jury . . . without revealing in advance . . . [certain] secretly taped conversations with him. . . ." 513 F.2d at 664. This clearly presented a more compelling situation than does the instant case, where the defendant was aware of his prior statements, although he had never seen the written reductions of them. Nonetheless, this Court ruled that "[t]here is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him." (*Id.*).

> to prosecution for false statement. . . . A grand jury witness has no right to inquire into the sources underlying questions asked of the witness [citation omitted], nor does a prospective witness have a right to inspect other evidence presently before the panel, even where the witness may be a target of the investigation." *Matter of Wood*, 430 F. Supp. 41, 48-49 (S.D.N.Y.; Pierce, D.J.), aff'd *sub. nom.*, *In re Cuezto*, 554 F.2d 14 (2d Cir. 1977).

Moreover, in his affidavit, Mr. Salzman states that Simpson "informed [him] that he had previously spoken to members or persons from the United States Attorney's office and that he told them what he knew and that he did not participate in any illegal activity and wished to testify before the Grand Jury." (Salzman Affidavit at p. 1).* When these facts are joined with the facts that during his questioning before the Grand Jury, Simpson never indicated that he desired to have his recollection refreshed with these statements or to be excused to consult with counsel,** and that, in both these prior interviews and that with his attorney, the defendant falsely denied his involvement in criminal activity, the simple fact that written reductions of these prior statements of which both Simpson and his attorney were aware were not furnished to counsel cannot prove inadequacy on the part of the attorney. *United States ex rel. Nelson* v. *Wyrick*, 422 F. Supp. 139, 141 (E.D. Mo. 1976); *cf.*, *United States* v. *Agurs*, 427 U.S. 97, 102 n.5 (1976): "We think it clear, however, that counsel's failure to obtain Sewell's prior criminal record [the *Brady* material there at issue] does not demonstrate ineffectiveness."

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* Salzman also states that he advised Simpson of "all of his rights" and Simpson "then informed me that he wished to proceed with his testimony." (Salzman Affidavit at p. 2).

** *Cf.*, *Perrone* v. *United States*, *supra*, 416 F.2d at 466.

See also *United States* v. *McGuire*, 381 F.2d 306, 319 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968) (failure of counsel to examine proffered 3500 material held not to result in effective assistance).*

In any event, having advised his attorney that he was aware of his prior statement, he had nothing to hide, and desired to testify before the Grand Jury, Simpson's present "claim that his lawyer failed to carry out his ethical and legal responsibiliti merely because the lawyer failed to convince his client to refrain from testifying borders on the ridiculous. . . ." *Johnson* v. *United States*, 506 F.2d 640, 645 (8th Cir. 1974), cert. *denied*, 420 U.S. 978 (1975).** In the final analysis, Simpson asks this Court to hold that an attorney who does not stop a client from testifying when the client has insisted on his innocence and where the client wants to relate his version

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* In more general terms, it has been repeatedly held that the failure of defense counsel to investigate all possible leads and examine every potential avenue of defense is a tactical decision not amounting to ineffective assistance. *E.g. United States* v. *Yanishefsky*, 500 F.2d 1327, 1332 (2d Cir. 1974); *United States ex rel. Crispin* v. *Mancusi*, 448 F.2d 233, 238 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States* v. *Tribote*, *supra*.

** See *United States* v. *Robinson*, 459 F.2d 1164, 1171-72 (D.C. Cir. 1972); *cf. United States* v. *Reide*, 494 F.2d 644, 646-47 (2d Cir. 1974). Compare *United States* v. *Kane*, *supra*, 243 F. Supp. at 753-54, wherein the defendant complained that his counsel was incompetent because he had advised defendant to invoke his Fifth Amendment privilege and not tell the Grand Jury his side of the story. Judge Weinfeld held counsel's decision entirely reasonable and, on this record, would similarly have held Salzman's decision proper.

In general, whether or not to allow a defendant to testify is a tactical decision by counsel that does not, in hindsight, bear on the quality of representation furnished. *E.g. United States ex rel. Crispin* v. *Mancusi*, *supra*; *United States* v. *Matalon*, 445 F.2d 1215, 1218-19 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *Perrone* v. *United States*, *supra*, 416 F.2d at 466; *United States* v. *Garguilo*, 324 F.2d 795, 797 (2d Cir. 1963).

of relevant events to the grand jury renders ineffective assistance and thus makes "a farce and a mockery of justice." See *LiPuma* v. *Commissioner*, *supra*, 560 F.2d at 93; *United States* v. *Yanishefsky*, *supra*, 500 F.2d at 1334; *United States* v. *Wight*, *supra*, 176 F.2d at 379. Such a result simply makes no legal or common sense.*

D. No Unfairness Surrounded the Grand Jury Proceedings.

In the final point of his brief, Simpson contends that the grand jury proceedings and the prosecutor's conduct were so fundamentally unfair as to warrant the reversal of his conviction. He premises this contention on several factors: the defendant's minimal education; the prosecutor's knowledge of Simpson's prior "consistent" statements;** and the Government's knowledge of its case against Simpson, as contrasted with the limited knowledge possessed by the defendant's recently appointed lawyer.***

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* Viewed in this proper context, the claimed ineffectiveness of counsel clearly has not been proven and did not prejudice Simpson because at the trial Simpson was adequately represented and fairly convicted on the basis of overwhelming evidence against him.

** Simpson's prior statements were consistent only in their falsity with his later perjurious testimony.

*** Defendant also points to the fact that "[t]he prosecutor also knew that the surveillance photos of Newport Auto Wreckers clearly placed Simpson in the yard." (Br. at 7-8). While the surveillance testimony of the FBI agents clearly accomplished this, the photos (GX 43 and Defendant Creaturo's Ex. D), taken at some distance, were ambiguous and clearly not inculpatory to Simpson who never denied his activities at Newport. In any event, under the express holding in *United States* v. *Camporeale*, *supra*, 515 F.2d at 185, the Government was under no duty to disclose the existence of these photographs, or the agents' surveillance testimony, to Simpson at the grand jury stage of the proceedings.

Based on these factors, Simpson argues that the prosecutor was obligated to make "full disclosure to Simpson's appointed attorney" and "should have been more cautious with a defendant like Simpson." (Br. at 8). Since this defendant was fairly and properly treated as a witness before the grand jury, his claims are without merit.

Judge Weinfeld's decision that the grand jury proceedings as to Simpson were fair was entire correct. As Judge Weinfeld found, prior to any questioning of Simpson before the grand jury, Simpson was adequately cautioned concerning his applicable constitutional rights and the scope of the grand jury's investigation. Moreover, Simpson was represented by counsel and informed by the Assistant United States Attorney that he was free to consult with this lawyer. Simpson was warned explicitly of his obligation to tell the truth, and the defendant stated that he understood these rights and warnings. During the trial, Simpson acknowledged that he had received the relevant advise of rights and that he understood his rights. (Tr. 755; GX 23).*

Moreover, during the course of his grand jury appearance, and without any request on Simpson's part, the prosecutor repeatedly attempted to refresh Simpson's recollection, not only from relevant FBI surveillance logs, but from the now disputed prior FBI report as well. (*E.g.*, Tr. 464; 466-67; 474-75). However, even these attempts to glean truthful answers from Simpson were to no avail, as the defendant repeatedly provided false responses. The prosecutor clearly could not, nor was he obligated to, do more to insure that the proceedings were

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* Indeed, when he first appeared before the Grand Jury on June 13, 1977, Simpson *sua sponte* invoked his Fifth Amendment right to refuse to answer questions. *Supra* at p. 22.

fairly conducted.* As this Court has observed, "A properly called and fully warned witness cannot complain about a statement voluntarily given; having chosen to tell his story he cannot later complain of his failure to assert his privilege to remain silent." *United States* v. *Capaldo*, *supra*, 402 F.2d at 824.**

In these circumstances, it is not surprising that Judge Weinfeld repeatedly rejected Simpson's claim that the grand jury proceedings were unfair. (*E.g.*, Simp. Snt. Tr. at 7). Indeed, Judge Weinfeld had authored the leading decision of this Circuit exactly on this point, *United States* v. *Winter*, *supra*, 348 F.2d at 210-11:

> "Appellant . . . contends that in the circumstances here presented it was unfair for the Government to have subpoenaed him as a grand jury witness. The essence of his argument is that since the grand jury already had evidence of payments to Winter, service of the subpoena impaled him on the horns of a trilemma: [incriminate himself, assert his Fifth Amendment privilege, or commit perjury]. Finally, he urges that, having placed him in this position, it was unfair for the prosecutor not to warn him of the prior grand jury testimony and not to advise him that a continued denial of the testimony would invite a perjury charge. As to this latter contention, there is no duty upon the

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* Indeed, the procedure here employed, that of affording counsel to Simpson and informing him of his "right" to consult with that attorney outside of the Grand Jury room during questioning (Tr. 453-54; see also Kaplan Pretrial Affidavit), satisfies even the more expansive view of a Grand Jury witness' rights suggested by Mr. Justice Brennan in his concurring opinion in *United States* v. *Mandujano*, *supra*, 425 U.S. at 605-06. See also *United States* v. *Capaldo*, *supra*, 402 F.2d at 824.

** Of course, there is no bar, and it is not "unfair", to call even a potential defendant before the Grand Jury. *E.g.*, *United States* v. *Wong*, *supra*, 97 S.Ct. at 1826 n.8 (and the cases there collected); *United States* v. *Bonacorsa*, *supra*, 528 F.2d at 1223.

> prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury. . . . As far as the Hobson's choice which he claims was forced upon him by his appearance before the grand jury, the short answer is that if the truth were incriminatory, it was his right to refuse to reveal it. Instead, having chosen to tell his story which the grand jury rejected and a petit jury found false, he cannot now complain of his failure to assert his privilege. . . . There is no basis for the charge that the prosecution engaged in any conduct which contributed to his testifying falsely. [footnotes omitted].*

See also *United States* v. *Sweig*, 441 F.2d 114, 121 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971).

Moreover, any doubt on this issue clearly was resolved by the Supreme Court in its recent decision in *United States* v. *Wong*, *supra*. There, a woman of Chinese origins, eight years of education in the United States and a very limited understanding of the English language, was called, testified and perjured herself, before the Grand Jury. 97 S.Ct. at 1824. Indeed, it was there conceded that, due to her limited command of the English language, Wong had not understood her rights, as they had been told to her, and, thus, was unwarned of her Fifth Amendment privilege at the time of her testimony. *Id.* at 1825. From these facts, it was contended that the resulting perjury indictment arose from "a situation so inherently unfair as to require suppression of perjured testimony."

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* Similarly, Simpson was asked questions in a manner clearly revealing that he did not have "a clean bill of health", *e.g.*, *United States* v. *Winter*, *supra*, "If I told you that the FBI observed you dismantling that automobile. . . ." (GX 23).

Id. In rejecting this claim, Chief Justice Burger, speaking for a unanimous Court, declared that:

> "To characterize these proceedings as 'unfair' by virtue of inadequate Fifth Amendment warnings is essentially to say that the Government acted unfairly or oppressively by asking searching questions of a witness. . . . But as the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions. 'Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them.' [Citations omitted]. . . . If the citizen answers the question, the answer must be truthful." *Id.* at 1827.*

In sum, contrary to the defendant's position, there was nothing unfair or unusual about Simpson's grand jury appearance. (Simp. Snt. Tr. at 6-7). Rather, he was a fully-warned grand jury witness who chose to blatantly lie during his testimony. The record before this Court makes clear that Simpson's "false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances," *United States* v. *Mandujano*, *supra*, 425 U.S. at 585 (Brennan, J., concurring), and, having chosen to lie, the law requires him to face the consequences of his action.

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* See also *United States* v. *Washington*, — U.S. —, 97 S. Ct. 1814, 1819-20 and n.6 (1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Of Counsel.

★ U. S. Government Printing Office 1978— 714-059-743

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EUGENE NEAL KAPLAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of February, 1978 he served a copy of the within Brief (2 copies) by placing the same in a properly postpaid franked envelope addressed:

Joseph I. Stone, Esq.
277 Broadway
New York, N.Y. 10007

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Eugene Neal Kaplan

EUGENE NEAL KAPLAN

Sworn to before me this

3rd day of February, 1978

Olga C. Grampp

OLGA C. GRAMPP
Notary Public New York State
No. 43-4620838
Qualified in Richmond Cty.
Comm. Expires March 30, 1979